

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DAVID JOHN TYRRELL, CHANTEL SPRING BUHROW,
BETH ANNE LANGE, DUANE GERALD KRZYSIK,
EARL DAVID BROCK, JAMES LOUIS CAHALL,
SAMUEL QCHENG LIN, RONNI LYNN WEINKAUF,
and UMA SANTHANAN

Appeal 2007-0326
Application 09/746,888
Technology Center 3700

Decided: May 2, 2007

Before CHUNG K. PAK, TERRY J. OWENS, and THOMAS A. WALTZ,
Administrative Patent Judges.

WALTZ, *Administrative Patent Judge.*

DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 from the Primary Examiner's final rejection of claims 1-7, 10-34, 37-41, 43, 45-47, and 49-57. The remaining claims in this application are claims 8, 9, 35, 36, 42, 44, and 48, which stand withdrawn from consideration by the Examiner

as directed to a non-elected invention (Br. 1; Final Office Action dated Nov. 1, 2002, 1). We have jurisdiction pursuant to 35 U.S.C. § 6.

According to Appellants, the invention is directed to an absorbent article including an outer cover, a liquid permeable bodyside liner that defines a bodyfacing surface and is connected in superposed relation to the outer cover, an absorbent body located between the bodyside liner and the outer cover, and a specified composition on at least a portion of the bodyfacing surface of the bodyside liner (Br. 2). Further details of the invention may be ascertained from illustrative independent claim 1 as reproduced below:

1. An absorbent article comprising:

- (a) an outer cover;
- (b) a liquid permeable bodyside liner that defines a bodyfacing surface and that is connected in superposed relation to the outer cover;
- (c) an absorbent body that is located between the bodyside liner and the outer cover; and
- (d) a composition on at least a portion of the bodyfacing surface of the bodyside liner that includes from about 10 to about 90 weight percent of a hydrophilic solvent, from about 5 to about 90 percent by weight of a high molecular weight polyethylene glycol, from about 0 to about 40 percent by weight of a C₁₄ to C₃₀ fatty alcohol, from about 0 to about 40 percent by weight of a C₁₄ to C₃₀ fatty acid and from about 0.1 to about 10 percent by weight of extracted botanical active.

Appellants state that the claims do not stand or fall together and list two groups of claims for each issue (Br. 7). To the extent Appellants have

presented specific, substantive arguments for the separate patentability of any individual claim, we consider these claims separately below. *See* 37 C.F.R. § 1.192(c)(7)(8) (2003), in effect at the time that Appellants' Brief was filed.

The Examiner has relied on the following references as evidence of obviousness:

Krzysik	US 6,149,934	Nov. 21, 2000
Klofta	US 6,238,682 B1	May 29, 2001
Kropf	US 6,316,030 B1	Nov. 13, 2001

ISSUES ON APPEAL

Claims 1-7, 10-13, 16-20, 40, 41, 43, 45-47, 49, 50, and 52-57 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Krzysik in view of Klofta (Answer 3).

Claims 14, 15, 21-39, and 51 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Krzysik in view of Klofta and Kropf (Answer 5).¹

Appellants contend that neither Krzysik nor Klofta discloses the claimed composition applied to a liner, and the Examiner has “picked and choosed” the components from the two references using hindsight (Br. 8).

Appellants contend that the Examiner has not adequately stated why one of ordinary skill would have selected particular compounds from Klofta and combined them with the teachings of Krzysik to arrive at the claimed

¹ We note that the Examiner inadvertently includes claims 35 and 36 in this rejection, both in the Final Office Action dated Nov. 1, 2002 (page 4) and the Answer (page 5). Both the Examiner and Appellants agree that claims 35 and 36 have been withdrawn from further consideration as directed to a non-elected invention (Br. 1; Final Office Action dated Nov. 1, 2002, page 1; Answer 2, ¶ (3)). For purposes of this Appeal, we do not consider claims 35 and 36 as included in this rejection.

composition, especially since Klofta is directed to anhydrous skin lotions having antimicrobial components for application to tissue paper (Br. 8).

Appellants contend that the Examiner has not explained why the portion of Klofta directed to “natural essential oil antibacterial actives” reads on the claimed “extracted botanical actives” (Br. 9).

Appellants also contend that Kropf does not contain any teaching about using nanoscale sterols and sterol esters in compositions applied to absorbent articles, but only teaches use in cosmetics (Br. 11).

The Examiner contends that Krzysik teaches all aspects of the claimed invention but teaches a skin care composition that differs from the claimed skin care composition, while Klofta teaches a skin care composition that encompasses the claimed skin care composition that results in a “soft, lubricious feel” (Answer 3-4).

The Examiner contends that Klofta discloses a “botanical active” (Answer 4).

The Examiner contends that Kropf teaches inclusion of sterols in lotion compositions “to provide a caring and protective effect and increase the skin moisture” (Answer 5).

Accordingly, the issues in this appeal are as follows: (1) has the Examiner established an adequate motivation to use the lotion composition of Klofta as the applied lotion in the absorbent article disclosed by Krzysik; (2) does Klofta disclose or teach a lotion component that “reads on” the “extracted botanical actives” as required by the claims on appeal; and (3) would it have been obvious to one of ordinary skill in this art to use the sterols taught by Kropf in the lotion compositions of Klofta and Krzysik?

We determine that the Examiner has established a prima facie case of obviousness in view of the reference evidence, which prima facie case has not been adequately rebutted by Appellants' arguments.² Therefore, we AFFIRM all grounds of rejection in this appeal essentially for the reasons stated in the Answer, as well as those reasons set forth below.

OPINION

We determine the following factual findings from the record in this appeal:

- (1) Krzysik discloses an absorbent article comprising a bodyside liner, an outer cover, an absorbent core located between the bodyside liner and the outer cover, and the liquid permeable bodyside liner defines a bodyfacing surface on which a lotion formulation has been applied, where the lotion formulation comprises an emollient, a wax, and a viscosity enhancer (Abstract; col. 2, ll. 10-30; col. 3, ll. 12-23; col. 9, ll. 31-41; and the Answer 3-4);
- (2) Krzysik desires a lotion formulation that has a reduced level of migration, which leads to improved transfer to the wearer's skin, and acts as a lubricant to reduce abrasion to the skin and improve the skin health (Abstract; col. 1, ll. 48-53; and col. 2, ll. 23-25);
- (3) Krzysik teaches the inclusion of "active ingredients" in the lotion formulation to "treat the skin" or act as a skin protectant (col. 11, ll. 7-22); Krzysik further teaches that additional ingredients can be

² We have also considered the Decision in related Appeal No. 2005-1186 (S.N. 09/746,872), as well as the record in related Appeal No. 2007-0042 (S.N. 09/746,880), and related U.S. Patent Nos. 6,287,581 B1 and 6,475,197 B1 (S.N. 09/382,018; *see* the Specification 2:13-20).

included in the lotion formulation, such as antimicrobial actives and “biological additives” to enhance the performance or consumer appeal of the product (col. 11, ll. 24-60);

- (4) Klofta discloses an anhydrous lotion composition for killing viruses and bacteria in addition to imparting a soft, lubricious lotion-like feel when applied to tissue paper; Klofta desires a lotion that is mild to skin, possesses a soft, lubricious feel, provides skin benefits, acts as a protective barrier, and easily transfers to the skin so that less lotion composition is required (Abstract; col. 4, ll. 26-49; col. 10, ll. 6-49; and the Answer 7);
- (5) Klofta teaches that these anhydrous lotions “tend to be mild to the skin thus mitigating the potential for skin irritation;” it is desirable to use ingredients that are as mild as possible, even more desirable to use ingredients that might provide a skin benefit (col. 1, ll. 23-25; and col. 2, ll. 37-40);
- (6) Klofta discloses skin compositions including hydrophilic solvents, high molecular weight polyethylene glycol, a fatty alcohol, a fatty acid, and “natural essential oils” (Abstract; col. 4, l. 50-col. 5, l. 28; col. 10, ll. 6-49; col. 11, ll. 9-15; col. 16, l. 31-col. 27, l. 37; and the Answer 4);
- (7) Kropf teaches the “caring and protective effect” of sterols in skin cosmetics, providing many benefits to the skin, and the improved absorption of sterols in the form of nanoparticles (col. 1, ll. 20-62; and the Answer 5);

- (8) Kropf teaches the well known use of “biogenic agents” in lotions or emollients, including such biogenics as “plant extracts” (col. 3, ll. 32-42; and col. 7, ll. 14-19).

During prosecution before the Examiner, the claim language is given the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account any definitions or other description contained in the Applicants’ specification. *See In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997). The claim language should only be limited if there is an express disclaimer of a broader definition. *See In re Bigio*, 381 F.3d 1320, 1325, 72 USPQ2d 1209, 1210-11 (Fed. Cir. 2004). It is well established that before a conclusion of obviousness may be made based on a combination of prior art references, there must be a reason, suggestion, or motivation to lead an inventor to combine those references. *See Pro-Mold and Tool Co. v. Great Lakes Plastics Inc.*, 75 F.3d 1568, 1573, 37 USPQ2d 1626, 1629 (Fed. Cir. 1996).

Applying the preceding legal principles to the factual findings in the record of this appeal, we determine that the Examiner has established a prima facie case of obviousness in view of the reference evidence, which prima facie case has not been adequately rebutted by Appellants’ arguments. We construe the claimed term “extracted botanical active” in accordance with Appellants’ Specification, where this term is defined as “any water-soluble or oil-soluble active extracted from a particular plant” that provides benefits to the skin (Specification 8:4-5 and 34:23-28). We determine that this term cannot be limited to the plant extracts exemplified by Appellants

(Specification 8:5-15 and 34:28-35:8) because there is no express disclaimer of a broader definition. *See Bigio, supra*.

As shown by factual finding (1) listed above, we determine that Krzysik discloses every limitation of claim 1 on appeal with the exception of the specific lotion composition required by this claim. However, as shown by factual finding (6) listed above, we determine that Klofta discloses a lotion composition including the same ingredients as required by claim 1 on appeal. In view of our claim construction discussed above, we determine that the “natural essential oils” taught by Klofta are derived from plants, provide benefits for the skin, and thus fall within the scope of the claimed “extracted botanical active” (*see Klofta*, col. 16, ll. 31-42). Additionally, as shown by factual findings (3) and (8) listed above, we determine that it was well known in the skin care composition art to use plant extracts for their beneficial effect on skin health. As shown by factual findings (2), (4), and (5) listed above, we determine that the Examiner has established sufficient motivation or reasons why one of ordinary skill in this art would have substituted the lotion composition of Klofta for the lotion composition of Krzysik, i.e., to produce the desired lubricious, mild, less irritating feel, provide skin benefits, and promote easy transfer to the skin thus necessitating use of a smaller amount of lotion.

As shown by factual finding (7) listed above, we determine that Kropf teaches the many benefits of adding sterols to skin care compositions, thus motivating one of ordinary skill in this art to add sterols to the lotion compositions of Krzysik and Klofta.

For the foregoing reasons and those stated in the Answer, we affirm the rejection of claims 1-7, 10-13, 16-20, 40, 41, 43, 45-47, 49, 50, and 52-

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57 under § 103(a) over Krzysik in view of Klofta, as well as the rejection of claims 14, 15, 21-34, 37-39, and 51 under § 103(a) over these references further in view of Kropf.

The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2006).

AFFIRMED

sld/ls

KIMBERLY-CLARK WORLDWIDE, INC.
401 NORTH LAKE STREET
NEENAH, WI 54956